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A valued California correspondent sends us an opinion by Judge McKinley, a *nisi prius* judge of Los Angeles, which, we think, is something out of the ordinary and therefore worthy of mention. The question was as to the right of a landlord over the passages leading to the rooms of his tenant. The controversy was the outcome of these state of facts. A book agent desires to canvass among the numerous occupants of a certain building for subscribers for that book. The owner of the building refuses to allow him so to do and threatens to eject him if he persists in so doing, though expressing his willingness to allow the agent to go to any office in the building upon the express request of the occupant. The question, as will be observed, is novel and important, in view of the large number of office buildings now existing in our cities. The court held that the agent had no right to enter and canvass in the building against the wishes and directions of its owner. The court conceded that every man has the absolute control of his own property, and the right to say who shall enter upon it, subject, of course, to the exception of officers executing process, etc. But his willingness that others should enter may be implied as well as expressed. Such an implied invitation to enter may naturally be inferred on the part of the owner or lessee of property to enter to transact business beneficial to the licensor. Thus, an implied invitation is held to be extended by the merchant to his customers, the physician to his patients, and the lawyer to those desiring to transact business with him. There is, also, in addition to the class who enter by implied invitation, those who may enter as mere licensees, who are there merely by sufferance, whose purpose is to secure their own advantage or pleasure. The owner of a building, says the court, who rents the rooms, parts with his title to the premises rented for the period of the lease, but as far as the halls, corridors and passages are concerned, all that the tenant ordinarily takes by the lease is an easement therein to pass over the same and the right to have parties having business with him pass through the halls. The owner continues to possess the right to control the halls subject only to the rights of parties therein which they have acquired by reason of their lease. It cannot be that those passages are to be treated as a part of the sidewalk or as in any degree dedicated to the public. The only persons who have acquired any right to the use of the halls are those who hold such right under the title of the landlord. It may be that persons who have received an express invitation to go to the room of a tenant have sufficient right to permit them to complain of an interference with their passage through the halls, although it may be doubted whether it is not entirely a question between the tenant and the landlord as to the obstruction of the easement. But the rule certainly cannot be stretched to allow every person who has merely the implied license of a tenant to visit him to complain of interference with his entry by the landlord forbidding him to enter. The above is, in brief, the view of the court. On the other hand, it may be said that when the room is leased, there goes with it by implication the right of way for the tenant and all persons who have any lawful business with him, whether for their own benefit or that of the tenant, to pass and repass to and from the rooms through the halls and passages to the street and that with this right the landlord had no right to interfere at all, so long as the visitor conducted himself properly. The question is certainly a nice one, without much light from the authorities and one not free from difficulty, though we are inclined toward the belief that the ruling of the California judge, if he is correctly reported, goes too far.

NOTES OF RECENT DECISIONS.

MECHANIC'S LIEN—FIXTURES — ELECTRIC WIRES.—In Hughes v. Lamberville Electric Light Co., 32 Atl. Rep. 69, it is decided by the Court of Chancery of New Jersey that wires and insulators which are used in forming and completing the connection between an electric light and power plant and dwellings, stores and other public places, for the purpose of conveying or transmitting light and heat thereto, are fixtures, within the

provisions of the mechanic's lien law. The court said in part:

This claim to a lien arises from the fact that the Southern Electric Company supplied the wires and insulators and did the work or labor of connecting the said wires with the poles and wires erected upon and along the streets with the dwelling houses, stores and other places of business, and that because of such connection they became part of the plant. This claim to the benefit of the lien law should be supported. The fifth section of the Mechanic's Lien Law (Revision, p. 669), provides that "any fixed machinery or gearing or other fixtures for manufacturing purposes, shall be considered a building for the purpose of this act." The phrase, "or other fixtures for manufacturing purposes," is as comprehensive as the language will admit of. Certainly, whatever appliances may be used for the accomplishment of a given purpose, through the use of fixtures, in a manufacturing establishment, may fairly be considered a "building," within this act. Whatever is so attached to the freehold as to be denominated a "fixture," and is essential to the successful operation of the plant, will pass with the freehold. Without the connection to the dwellings, stores and other public places by means of the wires, as above stated, the plant could not be operated according to the design. Such connection is absolutely essential. These wires connect with the main wires, which were strung upon the poles along the streets, which last named wires were all connected with the building or plant in which the electricity is generated. It is very well settled that where a thing is annexed to the freehold by the owner with the intention of making it a part thereof, and it is essential to the enjoyment of the freehold, it will be regarded as a fixture. Blancke v. Rogers, 26 N. J. Eq. 566; Potts v. Ordinance Co., 17 N. J. Eq. 396; Crane v. Brigham, 11 N. J. Eq. 29; McMillan v. Paper Co., 29 N. J. Eq. 610; Watson v. Manufacturing Co., 30 N. J. Eq. 484. In Van Keuren v. Railroad Co., 38 N. J. Law, 165, it was held that a railroad track, consisting of ties to which were fixed the iron rails, constructed for the purposes above indicated, was a fixture, and passed with the title to the land. In Philbrick v. Ewing, 97 Mass. 133, it was held that a water pipe attached to a main pipe in the street, and running across the land of a third person into a dwelling house upon the side of the street, for the purpose of carrying water into such dwelling, was a fixture, and passed with a conveyance of the lot. In Badger Lumber Co. v. Marion Water Supply, Electric Light and Power Co., 48 Kan. 182, 29 Pac. Rep. 476, it was held that poles placed in the street, upon which wires were strung, which wires were connected with an electric light andpower plant, were within the Kansas statute, which secured a lien upon buildings and the appurtenances to laborers and material men. In Beatty v. Parker, 141 Mass. 523, 6 N. E. Rep. 754, it was held that "a pipe connecting a house with a sewer built in the street, necessary to the use of the house, and included in the contract for building it, is a part of the house, and it is immaterial whether it is inside or outside of the walls of the house, under or above ground, whether extended one foot or thirty feet, or whether the fee of the land in the street was or was not in the owner of the lot on which the house was built." A petition to enforce a mechanic's lien for the land in placing said pipe was sustained. In Steger v. Refrigerating Co. (Tenn.), 14 S. W. Rep. 1087, it was decided that "a mechanic's lien for material furnished in laying pipes for a refrigerating company, which supplies vapor for "cold storage" to customers at a distance, through pipes in the ground, extends to the whole plant as an entirety, and may be enforced against the ground upon which the manufactory is located, although the pipes are laid on the land of strangers." The fact that these poles which support the wires along the streets stand upon the land the title to which may be in others, and that the wires which connect the main wires with the several dwellings, stores and other public places pass into and are fixed to the dwellings and stores and public buildings of persons who were strangers to the company, except as they gave their consent to such erection and the making of such connections, does not alter the rights of lien claimants. The effort is not made to enforce the lien against the land upon which the poles are erected, nor against the dwellings, stores or other places into which the connected wires are extended, but only against the plant itself and land whereon it stands. It is this which the lien law makes liable for materials and labor, and not the thing which becomes a fixture. For I apprehend that whether things furnished for a structure, whether a dwelling or manufactory, whether such thing be brick, lumber or machinery, a a lien will lie, whether the thing be actually placed in the building or not. The two cases last above cited show that it makes no difference in whom the owner of the fee may be, upon whose land or in whose dwelling the poles may be set, or the wires extended.

DEED—VENDOR'S LIEN ON CROPS—PRIORITIES.—The Supreme Court of Arkansas decides in Martin v. Schichtl, 31 S. W. Rep. 458, that a reservation in a deed of a lien on crops to be thereafter planted on the land, to secure the purchase money, is valid and entitled to precedence over the lien of a subsequent mortgagee who had actual notice thereof. Bunn, J., dissented. The court said:

In Apperson v. Moore, 30 Ark. 56, which was a suit in equity on the mortgage of a future crop, it was held the lien of a mortgage on an unplanted crop attaches, in equity, as soon as the subject of the mortgage comes into existence; and can be enforced, in a proceeding to foreclose, against the mortgagor, and those holding under him with record notice. This power was recognized and confirmed by an act of the general assembly, approved February 11, 1875, which made mortgages on crops to be planted valid.

It has been frequently held that a reservation in a lease of a farm of a lien on crops not *in esse*, which are to be grown on the land, as security for the payment of a stipulated rent, is sufficient to hold the crops so soon as they come into existence. Baxter v. Bush, 29 Vt. 465.

The reservation of the lien on crops in this case was an equitable mortgage. If a mortgage on a crop before it is planted, to secure an ordinary debt, and the lien of the lessor reserves in the lease, attach to the crop so soon as it is planted, the lien reserved by Mrs. Rice certainly attached and held the crops as a security for the payment of the purchase money.

The fact that the reservation is inconsistent with and repugnant to the grant in the deed does not defeat the lien. Reservations of easements, like a right of way in conveyances of land, and in leases of "grass, herbage, feeding, and pasturage," have been upheld, and yet they are inconsistent with the grant. Rose v. Bunn, 21 N. Y. 275.

The case of Darling v. Robbins, 60 Vt. 347, 15 Atl. Rep. 177, sustains our view. In that case it was held that a "reservation in a warranty deed of land of the crops that might be produced thereon, to secure the interest on the purchase money, is a valid lien, and may be foreclosed." The difference between this and that case is, the lien reserved on the crops in the former is to secure the payment of the notes given for the purchase money, instead of the interest alone, as in the latter case. But the rule is the same, and sustains the lien in both cases.

In Walters v. Meyer, 39 Ark. 560, Watson v. Pugh, 51 Ark. 218, 10 S. W. Rep. 493, and Quertermous v. Hatfield, 54 Ark. 16, 14 S. W. Rep. 1096, cited by appellants, no lien on crops was reserved or created by contract, and the law gave none. They were cases in which land was sold, and the vendee executed his note for the purchase money, and promised to pay it as rent. The court held that "calling the purchase money rent would not make it such, nor create a lien on the crops for its payment." In Walters v. Meyer, while so holding, Chief Justice English, who delivered the opinion of the court, said: "No doubt a vendor may, by contract, reserve a lien upon lands and crops, its fruits to secure the payment of purchase money."

The calling the lien reserved on the crops a "landlord's lien" does not defeat the manifest intent of the parties to create it. The misnomer cannot defeat the intention of the parties. Equity requires no particular words to be used in creating a lien. It looks through the form to the substance of an agreement; and if from the instrument evidencing the agreement "the intent appear to give or to charge or to pledge property, real or personal, as a security for an obligation, and the property is so described that the principal things intended to be given or charged can be sufficiently identified, the lien follows." In the case of Flagg v. Mann, 2 Sumn. 486, Fed. Cas. No. 4,847, Judge Story said: "If the transaction resolved itself into a security, whatever may be its form, and whatever name the parties may choose to give it, it is in equity a mortgage." Bell v. Pelt, 51 Ark. 433, 11 S. W. Rep. 684; 3 Pom. Eq. Jur. § 1237; 2 Devl. Deeds, § 1237.

It is said that the mortgage in favor of Martin & Harton, having been filed before the deed of Mrs. Rice, is entitled to precedence over the reserved lien, as to the crop of 1892. But this contention is not sustained by the decisions of this court.

In Taliaferro v. Barnett, 37 Ark. 511, Eliza Comer sold and conveyed certain lands to Panley, took notes for the purchase money, and reserved lien on the land in the deed for the payment of the notes. Panley sold the land to Barnett, who had actual notice, before he purchased, of the lien reserved by Comer. This court held that, inasmuch as Barnett derived title from Panley, he had, when he purchased, constructive notice of the lien; and, inasmuch as he also had actual notice of the same, the lien was valid and subsisting, and could be enforced against him.

In Stephens v. Shannon, 43 Ark. 464, Shannon sold and conveyed certain lands to Winfrey, and reserved a lien on the land. Winfrey afterwards sold and conveyed the land to Ivey, and Ivey sold and conveyed a portion of it to Stephens. The deed of Shannon, which contained the reservation of the lien, was not placed on record, but this court held that "Stephens was affected with notice of all the recitals in the title deeds of his vendor, whether they were of record or not."

According to the opinions of this court in the two cases last cited the lien reserved in a deed to a purchaser is not affected by the statutes providing for the registration of mortgages, but by the statutes providing for the acknowledgement and record of deeds, bonds, or instruments of writing, affecting the title in law or equity to any property which are contained in chapter 29, Sand. & H. Dig. Under them (the opinions) purchasers are affected by liens reserved in the deeds to their grantors, because they are required to take notice of what appears in their chain of title, notwithstanding the deeds are not on record. So they are affected by such liens if they had actual notice of them before purchasing. These results would not follow if the statutes providing for the registration of mortgages governed, for under them a mortgage constitutes no lien against strangers until it is filed with the recorder, even though they may have actual notice of its existence.

CONSTITUTIONAL LAW—ADULTERATION OF VINEGAR — ARTIFICIAL COLORING — POLICE POWER.—The Supreme Court of Ohio, in Weller v. State, 40 N. E. Rep. 1002, was called upon to decide a constitutional question of considerable interest, the decision being that where in the manufacture of vinegar, low wine, formed from fermented grain, is, previously to its acetification, passed through roasted malt, not for the purpose of adding any substantial ingredient to the vinegar, but for the purpose of giving it color, as well as aroma and flavor, and without this treatment it would be colorless, the vinegar so produced contains artificial coloring matter, within the meaning of section 2 of an act to prevent the adulteration of vinegar, as amended April 14, 1888; and its possession for the purpose of sale is an offense under the provisions of section 5 of the same act. Section 2 of the above entitled act, as amended April 14, 1888, does not exceed the police power of the State conferred on the General Assembly by the constitution in the general grant of legislative power, and is a valid law. The court says in part:

It is claimed that the primary object of using roasted malt is to give aroma and flavor to the vinegar, and that color is simply an incident to the process adopted in attaining the primary end, and hence that the giving of color in this way cannot be said to come within the meaning of the statute. But the evidence tends to show that the primary object was to give color. His purpose in using the roasted malt was a question of fact, to be determined by the court trying the case. His statement as to his purpose cannot control the court, if, in view of all the evidence, the court is satisfied that his real and principal purpose was to give color to the vinegar. Again, if the primary object was to give aroma and flavor, still the process adopted for this purpose was an artificial one. Distilled vinegar, as is that of the defendant, has no such aroma. It is given, if at all, by the artificial method of running the distillation through roasted malt, be-

fore its acetification, and artificial coloring is one of the principal results; and in such case it is not material whether color or aroma was the primary object, both being attained by artificial means. The process adds no substantial ingredients to the vinegar, for neither aroma, flavor nor color can be said to be substantial ingredients of any product. They are not susceptible of analysis, and are merely perceived by the aid of the senses.

The plaintiff in error, in support of his contention, relies largely upon Ammon v. Newton, 50 N. J. Law, 543, 14 Atl. Rep. 610. The case arose upon a conviction of Ammon under a statute of that State making it an offense for any one to have in his possession, for the purpose of sale, "oleomargarine that is colored, stained or mixed with annotto, or any other coloring matter or substance." It appeared by the plea of the defendant, and was admitted by the State, that cotton seed oil, a nutritious vegetable substance—formed about one-fifth of the product called "oleomargarine," and was used in its manufacture, not simply for the purpose of coloring the product, but as one of its substantial ingredients. The court, applying the rule *noscitur a sociis*, held that the language, "or other coloring matter," extends only to coloring substances that resemble annotto—substances used merely or chiefly for the same purpose, annotto being used only as a coloring matter—and that "the language cannot, with propriety, be interpreted so as to include materials employed chiefly to make up the substance of the compound, and which imparts some color only as a necessary incident of their use." The case is clearly distinguishable from the one before us. Our statute inhibits the possession, for the purpose of sale, of any vinegar, containing artificial coloring matter, and is therefore broader than the New Jersey statute as to oleomargarine. And again, as shown, the roasted malt in this case was used, not as a substantial ingredient, but only to give color, flavor or aroma, neither of which are substantial ingredients of the vinegar. The construction asked to be given this statute would permit a manufacturer to run distilled vinegar through roasted apples, and, by thereby imparting to it the color and aroma of cider vinegar, sell it in the market as such. And this, we understand, was claimed in the court below. But the purpose of this statute was, we think, to protect the public against such deceptions. Much is claimed from the fact that it was admitted on the trial that the vinegar of the defendant was wholesome, and that he did not intend to deceive any one by using the roasted malt, and labeling and selling his product as "malt vinegar." But this is wholly immaterial. It matters not what his intentions may have been. The tendency of such devices is to deceive the public, and the statute was enacted to afford it protection therefrom. Such a statute is clearly within the proper exercise of the police power of the State. Every one has the right to distinguish for himself what an article of food is, and have the means of judging for himself its quality and value. Palmer v. State, 39 Ohio St. 236; Powell v. Com., 114 Pa. St. 265, 7 Atl. Rep. 913; Powell v. Pennsylvania, 127 U. S. 678, 8 Sup. Ct. Rep. 992, 1257. In Powell v. Com., the act of the legislature of Pennsylvania prohibiting the manufacture and sale of oleomargarine, or keeping the product with intent to sell, was held to fall within the police power of the State—a power held to include the making of all "wholesome and reasonable" laws, not repugnant to the constitution, that the legislature may judge to be for the good and welfare of the commonwealth and its people. It was offered on the trial of the case to show by experts that oleomargarine is a wholesome article of food. This was rejected. Error having been assigned as to this, the court said: "The mere fact that experts may pronounce a manufactured article intended for food to be wholesome or harmless does not render it incompetent for the legislature to prohibit the manufacture and sale of the article. The test of the reasonableness of a police regulation prohibiting the making and vending of a particular article of food is not alone whether it is in part unwholesome and injurious. If an article of food is of such a character that few persons will eat it, knowing its real character; if, at the same time, it is of such a nature that it can be imposed upon the public as an article of food which is in common use, and against which there is no prejudice; and if, in addition to this, there is probable ground for believing that the only way to protect the public from being defrauded into the purchasing of the counterfeit article for the genuine is to prohibit altogether the manufacture and sale of the former—then we think such a prohibition may stand as a reasonable police regulation, although the article prohibited is in fact innocuous, and although its production might be found beneficial to the public, if in buying it they could distinguish it from the production of which it is the limitation," citing State v. Addington, 77 Mo. 110. The case may be regarded as a somewhat extreme one, but it was affirmed on error by the Supreme Court of the United States, in Powell v. Pennsylvania, *supra*, and is valuable as illustrating the extent of the power possessed by the legislature of a State over such subjects, when exercised to prevent deception and fraud in the manufacture and sale of an article of food. There can, as we think, be no question as to the validity of our own statute to prevent the adulteration of vinegar. A statute of the State of New York not only in substance, but in language, like our own, has recently been sustained by the Court of Appeals of that State. People v. Girard, 39 N. E. Rep. 823. In replying to the argument that the law is an interference with a vested right, Finch, J., in delivering the opinion said: "Sometimes it [the argument] is pertinent and weighty, but in this case it is neither. It becomes the assertion of a vested right to color a food product so as to conceal or disguise its true or natural appearance; in plain words, a vested right to deceive the public."

"OPEN COURT."

As the statutes of the various States provide in cases of default in divorce proceedings, that the testimony and proof shall be taken in open court, we thought an article on "Open Court," and the effect of non-compliance with these statutes, would be of interest to the profession. For example, the statutes of Illinois provide that the testimony in such cases shall be taken in "open court," and the question arises, would a decree rendered upon testimony, other than that taken in open court, be an irregularity or a nullity. It is some times difficult to distinguish between an irregularity and a nullity; but the safest rule is to determine what is an ir-

regularity and what is a nullity is to see whether a party can waive the objection. If he can waive it, it amounts to an irregularity. The court, in Jenness v. Circuit Court of Lapeer County,[1] in defining this distinction, said: "An irregularity is such a defect in legal proceedings as may be waived; a nullity is one that cannot." Such being the distinction between an irregularity and a nullity, we will now proceed to define the meaning of the words "open court." Abbott's Law Dictionary says: "This expression is to be understood as conveying the idea that the court must be in session, organized for the transaction for judicial business, or it may possibly mean public—free to all—the object of a statute that divorce cases shall be tried in open court is not merely to prevent secret proceedings therein, by providing that no one shall be refused admittance to the court while such cases are on hearing, but rather that the trial shall be before the courts themselves, and not elsewhere, or at any other time than the law prescribes for the sessions of the court."[2] Stone v. Stone,[3] was a suit for divorce. The service was obtained by publication. Rule No. 159, in that State, provides that the master, in divorce cases, shall examine into and report the fact and circumstances, etc. The court said: "The duties under an order of reference, especially in a divorce case, must be performed by the master in person; he cannot delegate his authority nor perform his duties by a subordinate." Mangels v. Mangels,[4] was a bill for divorce. The order of reference to the master was agreed to by both parties. Afterwards the defendant excepted to the report and reference. The court said: "It is our opinion that a divorce proceeding cannot be referred even by written consent of parties, in Missouri." Hobart v. Hobart,[5] was an action for divorce. Upon motion of the plaintiff, the cause was sent to a referee. The defendant objected to the order of reference, but the order itself recites that it was upon the agreement of the parties. It also recites that the exception was taken thereto by defendant. Objection to the reference and denial of referee's jurisdiction were renewed before and to the court upon the filing of the report. The cause was submitted to the Circuit Court upon the referee's report, exception thereto, and also of the pleadings and evidence taken at the reference. The report was confirmed, a decree entered granting the release prayed for in the petition. The court said: "We must regard the reference of the case as having been made with the consent of the defendant. We are, in this view of the case, required to determine whether the court, with the consent of the parties, has authority to refer a divorce case. The question depends upon the construction of certain sections of the Code, upon the subject of reference of actions, and the trial of divorce cases, which we will now proceed to consider. The provisions controlling the reference of causes in general are found in the following sections of the Code:

"Sec. 2815. All or any of the issues in an action, whether of fact or of law, may be referred upon consent of parties, either written or oral, in court entered upon the record."

"Sec. 2816. Where the parties do not consent, the court may, upon its own motion, direct a reference in either of the following cases:

1st. ———.

2d. ———.

3d. 'Where a question of fact shall arise in any action if equitable proceedings in which case the court, in the order of reference, shall prescribe the manner in which the testimony shall be taken on the trial.' "

Under these sections all actions may be referred by consent, and in chancery cases, wherein questions of facts arise, without consent. It may be conceded that, if no other provision renders these sections applicable to divorce cases, they may be referred by consent, under the first section just cited, and being prosecuted by equitable proceedings, they may be referred under the other when issues of fact arise. Code Sec. 2222, authorizing and governing proceedings for divorce, contains the following provision: "No divorce shall be granted on testimony of the plaintiff, and all such actions shall be heard in open court on the testimony of witnesses or depositions taken as in other equitable actions triable upon oral testimony, or by a commissioner appointed by the court." The

[1] 42 Mich. 469.

[2] Lawyers' Tax Cases, 8 Heiskell, 650; Kenyon v. Eastwood, 56 L. J. Q. B. 455.

[3] 28 N. J. Eq. 409.

[4] 6 Mo. App. 481.

[5] 45 Iowa, 501.

trial required in this section is to be had in open court. We are first charged with the task of determining the purport and effect of the words "open court." The language is simple and its meaning obvious. The trial must be in court. Blackstone, adopting Coke's definition, says: "A court is a place where justice is judicially administered." But this definition obviously wants fullness; it is limited to the place of a court in its expression. In addition to the place, there must be the presence of the officers constituting the court, the judge or judges certainly, and the clerk authorized to record the action of the court; time must be regarded, too, for the officers of a court must be present at the place and at the time appointed by law in order to constitute a court. To give existence to a court, then, its officers, and the time and place of holding it must be such as are prescribed by law, etc. The words "open court" used in the section before as an adjective qualifying the noun court, is to be understood as conveying the idea in this connection that the court must be in session, organized for the transaction of judicial business. This is its meaning when used elsewhere in the court. It may, possibly, in this connection, mean public—free to all. If so, such signification would not materially change the force of the expression, etc. The trial of divorce cases then must be before the court as we have expressed the meaning of the term. But it is insisted that the referee in this case, when in discharge of his duties, was the court, and therefore, this requirement was complied with. The proposition is untenable. The referee is not the judge of a court, but an officer thereof, acting under appointment and charged with certain special duties. The law confides to him no judicial powers further than they are conferred upon him by the court's appointment. He has no power to hold the court. If, therefore, he discharges the duties entrusted to him at the time and place described by law for holding courts, the tribunal cannot be called a court, for it has not a judge. But it is argued that as section 2819 provides the referee shall stand in the place of the court, and shall have the same power as far as necessary, to discharge his duty, the law regards him as the court. The language of this section refutes the proposition. He is not the court; he simply stands in the place. It is urged that the case was tried by the court, and the statute which we have had under consideration, was, therefore, complied with. This position depends for support upon the fact that the referee returned his report, with the evidence taken by him, which was duly considered by the court. The court, we presume, examined the evidence and decided upon the exceptions in the light of such consideration. But we cannot denominate such determination of the exception upon a consideration of the evidence, a trial of the case by the court. It was more in the nature of a review for the correction of errors. But whatever it may be like, certain it is that it is not and never has been called a trial as the word is used in law. It is not the trial in open court required in this class of cases. But it is said that the court adopted the finding of the referee upon the examination of the evidence, and, therefore, such findings becomes those of the court, and no prejudice could have resulted therefrom. The answer to this is that the law does not contemplate such proceedings, and permits the court no aid, if aid they be, in the administration of justice. The parties are by the law entitled to the unbiased and untrammelled judgment of the judge applied to their case. Instead of this, it is examined by him with a view to determine whether the findings of the referee are supported by evidence. The examination necessarily is of such a character that the influence and the weight of the findings are against the party excepting thereto. The court must overcome these findings in order to render a judgment for the party excepting thereto. It will at once be seen that the judge does not try exceptions to the referee's report with that freedom of mind he gives to original trial on the evidence. It requires no argument to show the prejudice resulting to defendant from such a course of proceedings in this case. Code Sec. 2222 provides that the court in actions of this kind may appoint a commissioner to take evidence. It is insisted that the referee in this case is a commissioner of the kind provided for in this statute. The distinctions between a commissioner and a referee are well understood by the profession. They need not be enumerated here. The court appointed a referee to take the

evidence, "to settle the issues of law and fact—to determine issues, and make reports of findings thereof." Surely, it cannot be seriously argued that the referee acted simply as a commissioner to take the evidence. The record shows that he discharged all the duties of a referee, determined all issues of law and fact and made report of such findings thereon. If he be regarded as a commissioner his duties were confined to taking the evidence; his findings of facts and law and other acts were without authority and void." And in Way v. Way,[6] the court in construing certain sections in chapter 40, on divorces, said that the language in this chapter is imperative.

Thus it follows that the hearing of the testimony in "open court" is a condition precedent to the validity of what is done; and the neglect of the statutory requirement is fatal to the decree. For, in Anthony v. Kasey,[7] and in Windsor v. McVeigh,[8] held that a departure of the court from established modes of procedure renders its judgment void, even though it may have jurisdiction both of the subject-matter and of the parties. A court, though possessing such jurisdiction is still limited in its mode of procedure, and in the extent and character of its judgments. The reason thereof is, that the courts of the various States have no common law jurisdiction over divorce proceedings, but their authority is confined to such express and incidental powers as are conferred by statute, and their power to dissolve the marriage relation is confined to those causes defined by statute. When a court exercises a special power, conferred upon it by statute, and not according to the course of common law, it must strictly comply with the requirements of the statute in its proceedings, and this compliance must affirmatively appear from the record itself." WM. A. MCNEILL.

Memphis, Tenn.

[6] 64 Ill. 410.
[7] 83 Va. 338.
[8] 93 U. S. 282.
[9] Hawes' Jurisdiction of Court, § 97.

RECEIVER — POSSESSION — LEVY OF EXECUTION.

GARDINER V. CALDWELL.

Supreme Court of Montana, June 3, 1895.

The possession of a receiver, *pendente lite*, will be protected by injunction against the levy and sale of property, in his hands, under execution issued by a court of co-ordinate jurisdiction.

HUNT, J. (after stating the facts): The issue tendered by the pleadings may be briefly stated as follows: Where, in an equitable action, a receiver has been appointed, *pendente lite*, by a court of competent jurisdiction, to take charge of the property and affairs, including rights of way, franchises, and assets of a corporation, and has taken charge and is in possession of all such property, can a judgment creditor of the corporation, who instituted his action and obtained his judgment in a court of co-ordinate jurisdiction in another district in the State, subsequent to the appointment of such receiver, and subsequent to the taking of possession by such receiver, levy an execution upon the property of the corporation in the hands of the receiver, or upon any interest that such corporation may have in such property in the receiver's hands? Under established and familiar principles governing the functions of receivers in charge of property in litigation, the receiver is to be regarded as the officer of the district court of Gallatin county, which in the exercise of its chancery powers, appointed him. He stands as an indifferent person, clothed with the power of receiving and preserving the property and assets involved in the suit wherein he was appointed for the benefit of whoever may finally be declared to be entitled to them. The principle upon which the court proceeded is based upon that of securing the subject-matter of the litigation to whoever may ultimately own it and be lawfully entitled to the possession of it. To effectually carry out this object, the court itself has by its order appointing a receiver, declared that it was inequitable that either party should have possession or control of the Gallatin Canal or any other property of the Gallatin Canal Company, and the rents, issues, and profits thereof, pending the litigation of the case referred to in the complaint. Without changing the title, but in the exercise of what is regarded as a branch of the extraordinary powers of a court of equity, the court may be said to have taken possession of the property, and deprived the corporation of its possession, and, through the receiver, assumed the entire control and custody thereof, and retains the same until, by formal adjudication, there is a determination of the rights of the parties interested. But the appellants claim a right to levy upon and sell the property of the corporation, even though it be in the receiver's hands, arguing that, while they may not have a right to dispossess the receiver, yet they may sell the canal, and thus establish a lien thereon, which need not interfere with any future act of the receiver, who would only proceed having due regard for the judgment creditors' rights. Just how appellant proposes to proceed to execute his plan without interfering with the receiver we cannot tell; nor can we satisfactorily reconcile his position with the reason of the established

rules of equitable jurisdiction, which forbid generally any interference with the possession of the receiver, not only upon grounds of convenience, but of danger of defeating the object of placing the fund or property *custodia legis*, by having the property wrested from the receiver's possession at the instance of any particular creditor, or so incumbered as to impair its value in his hands as a fund for final distribution in any judgment to be rendered in the original suit.

The earliest case to which the court have access and the leading authority laying down the doctrine that where a receiver has been put in possession of an estate, or to be more accurate, where the court has once taken possession by putting a receiver upon the estate, is Angel v. Smith, 9 Ves. 335, decided in 1804. Ejectment was brought without leave of court. Lord Eldon said: "It is clearly a contempt of this court to disturb sequestrators; and the party cannot claim, though by any adverse title, in any other way than by coming to be examined *pro interesse suo*. Consider the consequence. How are sequestrators to defend their possession against an ejectment? The court of king's bench have decided that where a sequestration is awarded to collect money to pay a demand in equity, if it is not executed, that is, if the sequestrators do not take possession, and a judgment creditor takes out execution, notwithstanding the sequestration awarded there may be a levy under the execution; intimating that, if the sequestration is executed, the other, though prior, must come here." The writ of sequestration referred to by the lord chancellor was issued to seize the personal estate and profits of the real estate of a defendant, and to detain them subject to the order of the court. It was intended to enforce the performance of the decree of the court where a defendant absconded. Bl. Comm. bk. 3, p. 444. It was argued before Lord Eldon, as appears by the report above referred to, that there was no difference between the position of a receiver and that of sequestrators, who were the officers of the court. Lord Eldon held that he had no doubt that, where sequestrators were in possession under the process of the court for the purpose of raising a duty, their possession could not be disturbed, even by an adverse title, without leave, "upon this principle: that the possession of the sequestrators is the possession of the court." "As to receivers, I am very sure, though I cannot refer to the case, that the same rule has obtained wherever a receiver has been put upon the estate. I am also very confident that I have heard that motion for leave to bring an ejectment against the receiver more than once, since I have sat here. The register also apprehends such motions have been made. There may be inconvenience in that, but the inconvenience the other way is enormous. If it is necessary to ask leave, the court must have credit for never refusing it where it ought to be granted; and, if so, very great purposes of convenience may be answered by putting the party to ask it."

We find this general principle sustained in the case of Atlas Bank v. Nahant Bank (Mass., 1839; Shaw, C. J.), 23 Pick. 480, where it was held in the case of an attachment by an individual creditor of the assets of a bank, made after the filing of the bill asking for an injunction on the bank, on the appointment of the receivers, that the transfer of the property to the receivers necessarily removed the property from all future liability to attachment at the suit of an individual creditor; that the proceedings had relation to the time of the filing of the bill.

In Hubbard v. Bank, 7 Metc. (Mass.) 340, in distinguishing between the case of an attachment before and one made after proceedings were instituted, praying for an injunction and the appointment of receivers, the court say: "In the latter case the attachment is ineffectual. The property is in other hands, and beyond the process of an attachment."

In Noe v. Gibson (1839), 7 Paige, 513, Chancellor Walworth said: "It is well settled that after a receiver has been appointed, and has taken the rightful possession of the property, it is a contempt of court for a third person to attempt to deprive him of that possession by force, or even by a suit or other proceeding against him without the permission of the court by whom the receiver was appointed;" and declared that this principle was applicable to every other interference with the possession of a receiver, sequestrator, committee, or custodian who holds the property as the officer of the court, as his possession is in law the possession of the court itself.

The Supreme Court of the United States, in Wiswall v. Sampson (1852), 14 How. 52, decided that, when a receiver had been appointed, his possession is that of the court, and any attempt to disturb it without the leave of the court first obtained will be a contempt on the part of the person making it. As peculiarly applicable to the contention of the appellants in the case at bar, we quote the following language from the opinion of Justice Nelson: "It has been argued that a sale of the premises on execution and purchase occasioned no interference with the possession of the receivers, and hence no contempt of the authority of the court, and that the sale, therefore, in such a case, should be upheld. But conceding the proceedings did not disturb the possession of the receiver, the argument does not meet the objection. The property is a fund in court, to abide the event of the litigation, and to be applied to the payment of the judgment creditor, who has filed his bill to remove impediments in the way of his execution. If he has succeeded in establishing his right to the application of any portion of the fund, it is the duty of the court to see that such application is made. And in order to effect this, the court must administer it independently of any rights acquired by third persons pending the litigation. Otherwise, the whole fund may have passed out of his hands before the final decree, and the litigation

become fruitless. It is true, in administering the fund the court will take care that the rights of prior liens or incumbrances shall not be destroyed, and will adopt the proper measures, by reference to the master or otherwise, to ascertain them, and bring them before it. Unless the court be permitted to retain the possession of the fund, thus to administer it, how can it ascertain the interest in the same to which the prosecuting judgment creditor is entitled, and apply it upon his demand?"

In Field v. Jones (1852), 11 Ga. 413, in equity, the receiver was held not subject to garnishment, and not at liberty to bring or defend actions without especial leave of court; that he was but the agent of the court, and could not involve it in litigation; and that, if a receiver were subject to garnishment, such, liability would defeat the ends for which receivers were appointed; and that his duty as receiver would be defeated by judgments at law on garnishment, and the beneficial jurisdiction of chancery in this regard would be defeated.

A more recent decision in Georgia takes the same view of the law. Marshall v. Lockett, 76 Ga. 289. See, also, Wap. Attachm. pp. 220, 221.

In Iowa, the Supreme Court held in the case of Martin v. Davis (1866), 21 Iowa, 535, that property levied upon while in the hands of a receiver appointed by the court was "in the custody of the law, and not properly or legally liable to seizure by an officer under an execution."

Robinson v. Railway Co., 66 Pa. St. 160, generally recognized as an authority, was where the plaintiff levied upon property of the defendant company, which, however, was mortgaged. A receiver had been appointed before the levy of the execution, but after judgment was recovered. The property levied on was included in the mortgage. The court held that it passed into the custody of the receiver; and to permit it, while in legal custody, to be levied on and sold under the process of another court, would at once raise a conflict of jurisdiction, and interfere with the right of the receiver of the court to manage the property under his appointment. "If the property," say the court, "might be taken piecemeal from the custody of the receiver, the remedy of the creditors under the mortgage would become worthless, or at least greatly imperilled. Ample authority has been cited by the defendants in error. If a creditor believes that the property was not legally mortgaged, or for any good reason should not pass into the hands of the receiver, his duty is to apply to the court having appointed the receiver to ask its discharge out of custody in order that he may proceed against it. For those reasons, we think, the court below was right in setting aside the levy and execution."

We find the argument of confusion and inconvenience of weight with certain courts, notably North Carolina, where it was held in Skinner v. Maxwell, 68 N. C. 400, that, "when a court of equity has undertaken to adjudicate upon and distribute a fund among the parties entitled to it, it would be inconvenient if a court of law (or any other court) could by its process interrupt the adjudication and create new rights in the property itself. This rule is not understood as absolutely preventing the acquisition of new rights to the fund in controversy after the commencement of the proceedings. Any person claiming to have acquired such an interest *pendente lite*, while he cannot interfere under the process of another court, may apply to the court which has jurisdiction of the fund, *pro interesse suo*, and his claim will be heard. 2 Story, Eq. Jur. §§ 831–833*a*. The limits of this principle are somewhat uncertain, but it is sufficient for the present case to say that, while property is in the hands of a receiver, no right to it can be acquired by sale under execution. And it makes no difference that the receiver appointed declined to act; the property was, nevertheless, in the custody of the law."

In a proceeding adjudging respondent guilty of contempt in not paying to the relator certain moneys which he held as receiver under the appointment of the court below, and which the court had ordered him to pay to the relator, but which he continued to hold as garnishee in proceedings taken in a justice's court. Chief Justice Campbell, in People v. Brooks (1879), 40 Mich. 335, held that the custody of a receiver is the custody of the court, and that it would lead to great confusion if a receiver were subject to take the funds in his official custody into any other tribunal, which could have no power to discharge him, to settle his accounts, or to punish him for collusion, and that the only practice which would save clashing among courts, and give to every court in equity such control over its own officers as is necessary, until they are finally discharged, was to not permit liens to be interfered with by garnishment or otherwise, without leave.

It was held in the case of Dugger v. Collins, 69 Ala. 324, that, when a sheriff has levied upon property in the hands of a receiver, equity will not interpose by an injunction in behalf of the sheriff enjoining a suit at law against him for interference, and that to permit property while in the custody of a receiver to be levied upon and sold under the process of another court would at once give rise to a conflict of jurisdiction, and would seriously interfere with and impair the receiver's right to the management of the property under his appointment. It was urged in the Alabama case that the possession of the property in the hands of the receiver need not be disturbed, just as is urged in the case under consideration by the appellants. But the court declined to follow the argument advanced, and, as against the right to levy and sell lands in the hands of a receiver, cited Wiswail v. Sampson and Robinson v. Railway Co., *supra*. It is to be observed, too, that the court took this view of the law in a case much stronger than the one at bar, for the plaintiff there obtained his judgment before the receiver was appointed, and before the property

was placed in his hands. Nevertheless, it was decided he did not acquire a lien by placing execution in the hands of the sheriff until long afterwards.

In Edwards v. Norton (1881), 55 Tex. 405, real estate in the hands of a receiver, to hold possession and collect the rents, was decided to be protected from levy of execution. In that case, too, it was urged that a levy on real estate left the possession undisturbed, and that the purchaser took the title of the defendant in execution subject to the possession of the receiver and the result of the suit. The court stated that argument was met by the cases of Wiswall v. Sampson, *supra*, and added that they could "see no sufficient reason why the rule should be relaxed so as to facilitate execution sales of real estate in litigation."

We are not wholly without authority bearing upon the question, in our own Supreme Court. In Stebbins v. Savage (1884), 5 Mont. 253, 5 Pac. Rep. 278, an appeal from an order appointing a receiver, Wade, C. J., said: "The appointment of a receiver carries with it a right to the possession of the property described, and the further right not to be interfered with in such possession so long as the appointment remains in force. These are the ordinary powers and rights that belong to a receiver in order to make his appointment effectual, and they would have belonged to him, and he could have possessed and held the property, if they had not been mentioned in the order. * * * He is an officer of the law, and in his hands the property is in the custody of the law. He preserves and protects the property for the benefit of the rightful owner."

The question was discussed in Jackson v. Lahee (1885), 114 Ill. 287, 2 N. E. Rep. 172. The court said: "The law will not permit that possession to be disturbed without the consent of the court that first obtained jurisdiction to appoint the receiver. It would seem an anomaly that a lien adverse to the rights of the receiver could be obtained, so as to control the distribution to be made. Obtaining a lien implies it may ultimately take the property or funds to which it attaches, and, if that could be done in this case, it would withdraw the same from the custody of the law, or from (what is the same thing) the custody of the receiver having the same in possession."

In Walling v. Miller, 108 N. Y. 173, 15 N. E. Rep. 65, the court of appeals held that a sale of property under levy of execution, where the property was in charge of a receiver, was void, unless authorized by the court which appointed the receiver. The doctrine is again recognized by the court of appeals of New York in *Re* Christian Jensen Co., 128 N. Y. 550, 28 N. E. Rep. 665.

In a very recent case, in the matter of the application of the Schuyler Steam Towboat Company for dissolution (136 N. Y. 169, 32 N. E. Rep. 623), a receiver had been appointed by the Supreme Court of the State on July 31, 1891. The order appointing the receiver was filed August 1, 1891. August 3d the bond was approved, and August 4th filed. In the afternoon of August 1st the boats belonging to the corporation were libeled, and the United States marshal took possession. The receiver brought suit to restrain the libelants from further steps in the United States court. The court decided that the right of possession was in the receiver from the time of filing and entering the order appointing him; that the property of the corporation vested in him; that the property was in the custody of the law, and no other court could obtain jurisdiction over the property after such appointment, even under process upon which possession was taken prior to the qualifying of the receiver; that the court had the power to preserve and to protect it, it being in the custody of the law; and that, furthermore, "as was said in Heidritter v. Oilcloth Co., 112 U. S. 305, 5 Sup. Ct. Rep. 135, 'when the object of the action requires the control and dominion of the property involved in the litigation, that court which first acquires possession, or that dominion which is equivalent, draws to itself the exclusive right to dispose of it.' That dominion was acquired by the order appointing the receiver in this proceeding." Freem. Ex'ns, § 129.

No sale of property in the hands of a receiver will be allowed on execution, under another judgment, without leave of court first obtained for that purpose. High, Rec. § 422; Beach, Rec. § 224; Daniell, Ch. Pl. & Prac. § 743; 2 Story, Eq. Jur. 833*a*. Persons claiming an interest in the realty may, doubtless, come into court and be heard in relation to their interests, but they cannot interfere with the possession of the receiver, unless by order of court. High, Rec. § 146.

The appellants reply on several cases not in point. In Bank v. Schermerhorn, 9 Paige, 372, the creditor who made levy upon the realty had secured judgment apparently before the petition was filed asking for a receiver. The case, too, arose on a question of contempt. Under the facts, which are very dissimilar to those in the case at bar, the court held that there was no contempt committed in levying. The principle sustained in the case goes no further than stated by High (section 171), that "where a receiver is in the actual possession of the defendant's real estate, which is subject to a lien of a judgment against the defendant, the levy upon and sale of the defendant's interest in the real estate by a sheriff does not disturb the receiver's possession, and is not a contempt of court." The text of Mr. High's book must be taken as cautiously restricted in its application to cases where the judgment was obtained and lien attached before the receiver was appointed. The exact purport of the opinion is expressly recognized in the Alabama decision cited above. See, also, Wheeler v. Walton & Whann Co., 65 Fed. Rep. 720.

Wheaton v. Spooner (Minn.), 54 N. W. Rep. 372, also relied upon by appellants, turned upon the right to levy an execution upon a judgment which had been obtained prior to the appointment of a receiver. It was held that a judgment creditor of the party who was the judgment creditor of the syndicate, whose property was in the receiver's possession, could levy by execution upon the judgment, as the judgment belonged, not to the syndicate, but to the judgment creditor, and was subject to his control.

Being impressed with the reasoning of the cases reviewed, and with the justice of the rule as it has been expanded since first enunciated by the English courts, we think it a sound policy to hold that while the defendants' property is in *custodia legis*, as in the custody of a receiver, there can be ordinarily no interference with the receiver's possession by actual seizure or by sale of the debtor's interest in the corporation's property subject to the possession of the receiver, where the execution has been issued since the receiver was appointed. And we are further satisfied that no such levy can properly be made under an execution issued from the District Court of Lewis and Clarke county against property in the hands of the receiver who was appointed by and was subject to the orders of the District court of Gallatin county. The appellants had a right, it would seem, to establish by judgment their debt against the corporation by suit in Lewis and Clarke county, but they had no right to proceed to levy an execution upon the property of the corporation in the custody of the receiver in another judicial district. In an exhaustive and learned opinion of the Supreme Court of Alabama, rendered in 1891 (Gay v. Iron Co., 94 Ala. 303, 11 South. Rep. 353), after carefully reviewing many federal decisions, the principle that no court can interfere with the custody of property held by another court though a receiver, but that all claims on the property in the custody of the receiver must be under the control of the court having such custody, is discussed; and the conclusion reached that, to preserve harmony between courts of concurrent jurisdiction, it is very important that the writs or processes of one court shall not interfere with or disturb the possession of any subject-matter then in *gremio legis*. See, also, Dillingham v. Anthony (Tex. Sup.), 11 S. W. Rep. 139.

We do not attach importance to the lack of actual knowledge on the part of the judgment creditor in the suit at law (Marlow) of the fact that a receiver had been appointed by the court in the tenth judicial district. That point might have some bearing in a contempt proceeding, where different considerations control, but not in this action for injunction against an unwarranted levy. The denial of the right to levy the execution is upon the broader grounds hereinbefore discussed. As was said by the vice chancellor in Evelyn v. Lewis, 3 Hare, 472: "Whether the party proceeding at law did or did not know that a receiver had been appointed over the property, or however clear the right of the claimant might be, the court would restrain the prosecution of the claim if it were instituted without leave of this court."

Restricting our decision, therefore, to a negative answer to the principal question stated, we think that the district court which appointed the receiver properly restrained the sheriff from proceeding, and the judgment creditor from trying to enforce collection by interfering in any way with the receiver or the property in his custody.

The judgment is affirmed.

Penberton, C. J., and De Witt, J., concur.

NOTE.—The receiver of a court of equity, is its executive officer in much the same manner that the sheriff is the executive officer of a court of law. The property in his possession is in the custody of the law, much in the same sense, and to the same extent as if it had been levied on, under execution or attachment. *Re* Merchants' Ins. Co., 3 Biss. 165. His possession is the possession of the court, and is adverse to none of the claimants. Such possession is the custody of the law for the benefit of whoever appears ultimately to be entitled thereto. Robinson v. Railroad, 66 Pa. St. 160; Skinner v. Maxwell, 68 N. C. 400; Angel v. Rose, 9 Ves. 335, cited in the principal case. But see also De Visser v. Blackstone, 6 Blatch. 235; Mayo v. Rose, Freem. (Miss.) 703; Day v. Postal Tel. Co., 66 Md. 354. The precise nature and character of this possession has been admirably expressed by Mr. Justice Hargrave in *Re* Butler's Estate, 13 Tr. Ch. N. S. 456 (where the receivership was of a landed estate), as follows: "The general principal is that the possession of the receiver is that of all the parties to the suit according to their titles. As between the owner and incumbrancers, it is for some purposes the possession of the incumbrancers, who have obtained or extended the receiver; as between the owner whose possession has been displaced and a third party, it is the possession of the former. The receiver is in fact his agent; all the rents are applied to his use either by paying his debts, or paramount charges, or by being handed over to him." So perfect is the receiver's possession that he is regarded as having such a special interest in the property, as that the ownership is properly averred in him in an indictment for larceny of it. State v. Rivers, 60 Iowa, 381. On principle, we might fairly expect that a court of equity, having seized the property for the purpose of adjusting the relative rights of all the conflicting claimants thereto, according to the principles of equity would view with little tolerance any attempt on the part of other courts or officers to meddle with its possession. If a person claims to have an interest in the subject matter of the litigation and that it is prejudiced by the appointment of a receiver, the court upon proper application will permit him to assert his rights, by action against the receiver under leave of the court, or by permitting him to be examined *pro inter esse suo*, the latter being generally regarded as the most convenient and desirable practice. Brooks v. Greathed, 1 Jac. & W. 176; Brien v. Paul, 3 Tenn. Ch. 357; Skinner v. Maxwell, 68 N. C. 400; Jacobson v. Landall, 73 Wis. 142. But unauthorized interference on any pretense will not be tolerated. Evelyn v. Lewis, 3 Hare, 472; Russell v. Railroad, 3 Mac. & G. 104; Ames v. Trustees of Birkenhead Docks, 20 Beav. 332; Brooks v. Greathed, 1 Jac. & W. 176; De Winton

v. Mayor of Brecon, 28 Beav. 200; Spinning v. Ohio L. Ins., etc. Co., 2 Disn. 368; Vermont & C. R. Co. v. Vermont Cent. R. Co., 46 Vt. 792; *Ex parte* Cochrane, L. R. 20 Eq. 282. Ordinarily an action of ejectment cannot be maintained, but the claimant must pursue his remedy against the receiver in the action in which he was appointed. Fort Wayne, etc. R. Co. v. Mellett, 92 Ind. 535. See also Potter v. Spa Spring Brick Co., 47 N. J. Eq. 442. If property in the receiver's hands is claimed by one not a party to the proceeding, a petition or motion will nevertheless be entertained on the claimant's behalf for an order on the receiver to deliver the property to him. Riggs v. Whitney, 15 Abb. Pr. 388. Nor will an action of trespass by such claimant lie, but he must apply to the court appointing the receiver for redress. *Re* Day, 34 Wis. 638; *Ex parte* Cochrane, L. R. 20 Eq. 282. And this rule, as to the exclusiveness of the receiver's possession is applied whether the alleged right of the claimant is paramount to or under the right which the receiver is appointed to protect. Evelyn v. Lewis, 3 Hare, 472. On the precise point discussed in the principal case, viz: the sale on execution of property in the hands of a receiver, see, in addition to the cases cited in the opinion above, Edwards v. Norton, 55 Tex. 405; Ellis v. Vernon, I. L. & W. Co., 86 Tex. 109; Cole v. Oil Well Supply Co., 57 Fed. Rep. 534; St. Louis, etc. R. Co. v. Whitaker, 68 Tex. 630.

Ellis v. Vernon I. L. & W. Co., 86 Tex. 109, may be regarded as carrying doctrine of the inviolability of the receiver's possession to its extreme limits. There, an execution had already been levied upon the real estate of an insolvent corporation when its assets passed into the hands of a receiver appointed in an action to wind up its affairs. It was held that a sale, made thereunder after the appointment of the receiver would pass no title to the property sold.

CORRESPONDENCE.

CRITICISM OF A MISSOURI DECISION.

To the Editor of the Central Law Journal:

On page 79 of the current volume of the JOURNAL I see there is a criticism of the case of Maddox v. Duncan, recently decided by the St. Louis Court of Appeals. The court was unquestionably right and the critic wrong. Your critic fails to distinguish between one who is an indorser with an enlarged liability, and one who is a guarantor only. The payee of a note, who indorses the same to a third person, waiving protest, notice and demand, and guaranteeing payment, is not a guarantor only, but is an indorser whose liability has been enlarged by the contract of indorsement. A guarantor is not liable to be sued jointly with the person whose contract he guarantees. 14 Oreg. 485. But the payee of a note, who indorses it as above, is liable jointly with the maker, and can be sued at the same time. 2 Randolph on Com. Paper, §§ 745, 849; Marion v. Adamson, 11 Iowa, 371; Robinson v. Lair, 31 Iowa, 10; Heard v. Dubuque Co. Bank, 8 Neb. 10, 30 Am. Rep. 811; Green v. Burrows, 47 Mich. 70; Buck v. D. Savings Bank, 26 Am. St. Rep. 392; Banking Co. v. Zelch, 59 N. W. Rep. 544.

Albany, Oreg. D. R. N. B.

JETSAM AND FLOTSAM.

INDEPENDENCE OF ENGLISH LAWYERS.

Our American correspondent writes: "One feature of the Oscar Wilde Case cannot fail to strike American lawyers with considerable force—namely, the withdrawal of Sir Edward Clarke from the case or his withdrawal of the case, whichever it may be deemed. There are very few lawyers in this country who would have had the courage to do that. In the city of my residence a man and his wife were very recently tried for murder, the principal evidence against them being their confessions (corroborated strongly by circumstances), and their counsel were quite generally thought to be in fault for declining to sum up the evidence to the jury and relying exclusively on the legal points raised as to the admissibility of the confessions. The incident in the Wilde Case shows to my mind the superior independence of the English to the American lawyer. Sir Edward is highly regarded here, and probably no American lawyer would censure him for his course; but at the same time it would have been a 'fight to the finish' simply from want of courage to stop."—*London Law Journal.*

HUMORS OF THE LAW.

A story is told of a judge who lately had the hypnotic plea raised before him by a burglar. The prisoner claimed that he did not know that he was "burgling;" that he did it automatically and unconsciously under the direction of a hypnotist. The judge said he would give him the full benefit of the law, and also of his hypnotic misfortune. He thereupon sentenced the man to ten years in State Prison, but told him he could, if he chose, send for the hypnotist and have himself made unconscious for the term of his imprisonment.

"The same power," said the judge "which enabled you to commit burglary, and not know it, ought also to enable you to suffer imprisonment with hard labor and not be aware of it. At any rate, this is the best I can do for you."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. ADMINISTRATION — Executors and Administrators. —Under Gen. St. 1883, § 3629, providing that, when an administrator shall publish proper notice of his desire to make a final accounting, the court may approve his accounts and discharge him, but that no such discharge shall in any manner affect the rights of any creditor, heir, or devisee to sue on the bond of the administrator for any breach of the condition thereof, the heirs are concluded, in an action on the administrator's bond, as to all matters embraced in the administrator's account.—HARTSEL V. PEOPLE, Colo., 40 Pac. Rep. 567.

2. ADVERSE POSSESSION — Prescription. — One in possession of lands under a pre emption entry and patent from the United States is not charged with notice that the lands were swamp lands 20 years prior to the patent, and, as such, had passed under a prior act of congress granting swamp lands to the State, nor with notice that the land was within the territorial limits of a town, where neither of these facts nor the date of entry appears on the face of the receiver's receipt or patent; and therefore such patent is a "just title," and sufficient to sustain a plea of prescription, under Code La. arts. 3481-3484.—TEXAS & P. Ry. Co. V. SMITH, U. S. S. C., 15 S. C. Rep. 994.

3. AGISTOR'S LIEN — Enforcement. — Gen. St. § 1705, giving a "herder of cattle" and other petsons who "shall be intrusted" with the charge or care of "sheep" or certain other animals a lien thereon for services, does not give such lien to one merely hired to take care of sheep, the possession and control of which remain in the owner.—HOOKER V. MCALLISTER, Wash., 40 Pac. Rep. 617.

4. APPEAL — Presumptions.—When the facts are not before the court, a decree holding a mortgage valid will not be disturbed on the presumption that facts embraced in a proposition against the decree existed. —PHILLIPS V. WISE, Tex., 31 S. W. Rep. 428.

5. ATTACHMENT — Wrongful Attachment.—In an action to recover for loss sustained by being deprived of an advantageous sale of realty by levy of an unlawful attachment thereon, evidence of the agent of plaintiff that he knew by declarations of the prospective vendee, made at the time of refusal, that the attachment levy was the cause of his refusal to complete the purchase, is incompetent.—TILLMAN V. WETSEL, Tex., 31 S. W. Rep. 433.

6. ATTACHMENT — Claim by Intervener. — Plaintiffs attached a stock of goods as defendant's, which were in possession of and claimed by intervener under a bill of sale from defendant, made before the attachment. The inventory of sale to intervener contained fewer articles, and was considerably less in amount, than the sheriff's inventory in attachment: Held, that plaintiffs were entitled to their attachment lien on the goods not included in the sale to intervener.—EVERSMAN V. CLEMONS, Colo., 40 Pac. Rep. 575.

7. ATTORNEY—Liability of Ward.—Services rendered to the grandfather of a minor in the progress of a litigation which resulted to the latter's pecuniary benefit, places upon her a legal obligation to compensate the attorney at law who conducted them the *quantum meruit* value of same.—LEA V. HART, La., 17 South. Rep. 593.

8. ATTORNEY'S FEES — Evidence as to Value.—The wealth of a client cannot be considered in determining the fees of the attorney.—STEVENS V. ELLSWORTH, Iowa, 63 N. W. Rep. 683.

9. CARRIER — Passenger.—To render a railway company liable for injuries by one passenger to another, it must appear that the company was negligent it failing to put the passenger, actually doing the injury, off the car, and it is not sufficient that it failed to put off another passenger who had assaulted the one doing the injury.—LOUISVILLE & N. R. Co. V. MCEWAN, Ky., 31 S. W. Rep. 465.

10. CARRIERS OF PASSENGERS — Limiting Liability.— Plaintiff was injured in Iowa by defendant's negligence while in charge of cattle shipped on defendant's train from Iowa to Illinois. The contract of shipment provided that the company should not be liable for such injury in an amount exdeeding $500: Held, that such contract was void under Code, § 1308, providing that a railroad corporation shall not exempt itself by contract from any of its liabilities as a common carrier.—SOLAN V. CHICAGO, M. & ST. P. RY. CO., Iowa, 63 N. W. Rep. 692.

11. CHATTEL MORTGAGE — Consideration. — Where a debtor executes a mortgage on his homestead to secure the debt and the creditor releases the mortgage in consideration of a mortgage on the debtor's stock, the other creditors of the mortgagor cannot set aside the chattel mortgage on the ground that the mortgagee, by securing his debt on the homestead, induced them to extend the credit to the mortgagor, though, when the chattel mortgage was executed, the mortgagor was insolvent.—BRADLEY V. G. GOTZIAN & CO., Wash., 40 Pac. Rep. 623.

12. CHATTEL MORTGAGE.—Under Rev. Civ. St. art. 3190a, providing that a reservation of title in a chattel to secure the purchase price shall be a chattel mortgage, a contract of sale authorizing the vendor, on failure of the vendee to pay the purchase price, to take possession of the property, and convert it to his own use, without refunding money already paid, is a chattel mortgage; and the vendor's right to take the property on the vendee's default is subject to the rights of the latter as mortgagee.—HARLING V. CREECH, Tex., 31 S. W. Rep. 357.

13. CONTRACT WITH LOAN AGENT. — Where a party employs a loan broker to obtain a loan of money for him, or to sell a note and mortgage,—the contract of employment being in writing, and wholly silent as to the time within which the broker is to obtain the money,—the latter is entitled to a reasonable time; all of the circumstances to be taken into consideration when determining this period of time.—PETERSON V. HALL, Minn., 63 N. W. Rep. 733.

14. CONTRACTS—Consideration.—As by Rev. St. art. 4488, every written contract made in the State imports a consideration, the filing of a reply by plaintiffs under oath, alleging that the contract set up as a defense was without consideration, did not shift on defendant the burden of proving a consideration.—GULF, C. & S. F. RY. CO. V. HUGHES, Tex., 31 S. W. Rep. 411.

15. CONSTITUTIONAL LAW—Suit against a State.— A suit, brought by a citizen of the United States against the supervisor of registration of a State, charged, under the State statutes, with the duty of superintending the registration of voters, to restrain him from carrying out the provisions of such statutes, on the ground that they violate constitutions of the States and of the United States is not a suit against the State. —MILLS V. GREEN, U. S. C. C. (S. Dak.), 67 Fed. Rep. 818.

16. CONSTITUTIONAL LAW— Suit against State.—The statute of South Carolina known as the "Dispensary Law" prohibits citizens of that State from bringing into it, for their own use, alcoholic liquors purchased in other States, and directs the seizure and confiscation of such liquors, but provides for the purchase of such liquors either in or out of the State by State officials, and for their sale by such officials. One D, a citizen of South Carolina, purchased in other States, and imported, for his own use, certain alcoholic liquors, which were seized by the State constables, acting under the dispensary law. D filed a bill in the Federal court for an injunction to restrain such constables from continuing their interference with his importation of alcoholic liquors; alleging that the dispensary law was an interference with interstate commerce, and in contravention of the acts of congress relating thereto: Held, that the suit was not a suit against the State.—DONALD V. SCOTT, U. S. C. C. (S. Car.), 67 Fed. Rep. 854.

17. CONTRACT —Parol Evidence.— Civ. Code, §§ 1640, 1646, relating to the construction and interpretation of contracts, contemplate the introduction of parol evi-

dence when a contract is ambiguous or uncertain, or fails to express the real intention of the parties through fraud, mistake or accident. — LASSING v. JAMES, Cal., 40 Pac. Rep. 534.

18. CONSTITUTIONAL LAW—Mining Claim.—Gen. Laws, div. 5, § 1477, requiring the notice of location of a mining claim to be "on oath," was a proper exercise of the power of the State legislature.—MCCOWAN v. MCLAY, Mont., 40 Pac. Rep. 602.

19. CONSTITUTIONAL LAW — Delegation of Powers to Cities.—The provision of an act amending a city charter that within the city, the laws of the State as to Sunday closing of saloons shall be in force, is not violative of Const. art. 6, § 28, providing that all laws relating to courts shall be general and of uniform operation throughout the State though other cities by their charters had been given exclusive power to regulate such matters by ordinance. — JOHNSON v. PEOPLE, Colo., 40 Pac. Rep. 576.

20. CORPORATIONS—Salary of Secretary.—The by-laws of a corporation provided that the secretary should be elected for a year, subject to removal by the directors, and that his duties should be to keep the accounts of the corporation, and transact all its business: Held, that on a sale by the corporation of its business the term of office of the treasurer terminated, and therefore the vendee, though it agreed to fulfill all the contracts of the corporation, was not liable to the secretary for his salary for the balance of the unexpired portion of the year for which he was elected.—UNION COMPRESS CO. v. DOUGLASS, Ark., 31 S. W. Rep. 455.

21. CORPORATION—Corporate Stock—Assessment.—A subscription for capital stock of a corporation cannot be canceled, except for fraud or mistake, without the consent of all the stockholders.—PACIFIC FRUIT CO. v. COON, Cal., 40 Pac. Rep. 542.

22. CORPORATION — Liability of Stockholders.—A stockholder of a corporation may sue the other stockholders for their *pro rata* of a debt due him.—BROWN v. MERRILL, Cal., 40 Pac. Rep. 557.

23. COURTS — Conflicting Jurisdiction.—Where two courts have concurrent jurisdiction of a criminal cause, the court first acquiring jurisdiction of the offense and of the person of the defendant retains jurisdiction until the final determination of the case to the exclusion of the other.—STATE v. CHINAULT, Kan., 40 Pac. Rep. 662.

24. CRIMINAL LAW—Separation of Jurors.—Code Proc. § 1311, providing that juries in criminal cases shall not be allowed to separate except by consent of defendant and the prosecuting attorney, does not preclude the court, over defendant's objection, from allowing 11 men in the jury box, each of whom had been passed for cause, but none of whom had been sworn as jurors, to separate during a recess taken to summon an additional venire, where defendant had used only 4 peremptory challenges, and the prosecution none.—STATE v. VOORHIES, Wash., 40 Pac. Rep. 620.

25. CRIMINAL LAW—Procedure by Information.—A judgment of conviction cannot be attacked, as having been obtained without "due process of law," because the procedure was by information instead of by indictment.—IN RE BOULTER, Wy., 40 Pac. Rep. 520.

26. CRIMINAL PRACTICE — Grand Jury—Quashing Indictment.—The fact that the sheriff, without any excuse, fails to summon all of the grand jurors on the list furnished him by the jury commissioners, thereby necessitating the judge to summon a bystander to complete the jury, under Sand. & H. Dig. § 4285, providing that if there are not enough grand jurors present the court may order bystanders to be summoned, does not invalidate the panel, so as to authorize the quashing of an indictment returned by it.—STATE v. SWIM, Ark., 31 S. W. Rep. 456.

27. CRIMINAL LAW—Gaming.—Defendant and another played for the drinks on a pool table. The loser paid for the drinks, but there was no prior agreement that he should do so: Held, that such play was within the purview of Pen. Code, arts. 360, 364, prohibiting betting on a gaming table. Where exceptions were not reserved to the charge, and special instructions were not requested on a trial for a misdemeanor, the charge will not be revised on appeal.—DUNBAR v. STATE, Tex., 31 S. W. Rep. 401.

28. CRIMINAL PRACTICE — Perjury — Indictment.—An indictment for perjury charged that defendant falsely testified before the grand jury that one "A S did not play at a game with cards in a house on A S's place:" Held, that the indictment was insufficient, because the testimony was not material to the investigation of the grand jury, card playing not being prohibited, except, as provided by Pen. Code, art. 355, at certain public houses.—WEAVER v. STATE, Tex., 31 S. W. Rep. 400.

29. CRIMINAL PRACTICE—Time of Entering Judgment.—Code Cr. Proc. art. 941, requiring all judgments of a justice of the peace in a criminal action to be rendered in open court, and entered on his docket, does not make a judgment void because not entered till nine days after it was announced.—EX PARTE QUONG LEE, Tex., 31 S. W. Rep. 391.

30. CRIMINAL LAW—Homicide.—Where defendant set up self defense, a charge that if, when defendant shot deceased, he believed, "and was justified in believing," that it was necessary for him to shoot defendant to save his life or protect himself from serious bodily injury, then he should be acquitted, was error.—REEVES v. STATE, Tex., 31 S. W. Rep. 382.

31. CRIMINAL LAW — Misconduct of Juror.—The fact that a juror in a prosecution for burglary read a decision in one of the reports after the jury had retired, but before he had come to any conclusion as to the guilt of the defendant, and made affidavit that he was influenced thereby, is not ground for reversal, where it does not appear how he was influenced by reading the case, or that defendant was prejudiced thereby.—MUNOS v. STATE, Tex., 31 S. W. Rep. 380.

32. CRIMINAL PRACTICE — Forgery — Indictment.—Where, in a prosecution for the forgery of a railway ticket, a blank form of which was procured by defendant, the forgery consisted in filling in of the blank for the place of destination, and then placing a stamp on the back, such matters should be distinctly averred in the indictment.—OVERLY v. STATE, Tex., 31 S. W. Rep. 377.

33. CRIMINAL LAW — Mortgaged Chattels.—The fact that a chattel mortgage has been recorded does not necessarily prevent a disposal of the mortgaged property by the mortgagor with an intent to defraud the mortgagee, on the ground that the purchaser consequently took with notice of the mortgage.—THORNTON v. STATE, Tex., 31 S. W. Rep. 372.

34. CRIMINAL LAW — Homicide — Instructions.—Pen. Code, art. 612, relating to homicide, provides that, "if the instrument be one not likely to produce death, it is not to be presumed that death was designed, unless shown by the manner in which it was used:" Held, on a trial for murder committed by striking deceased with a stick, that a charge that when the instrument used, or the means in which it was used, was reasonably calculated to produce death, then the law presumes that such was the intent of the party, is erroneous, because it left the jury to infer intention from the mere fact that death followed the blow.—SHAW v. STATE, Tex., 31 S. W. Rep. 361.

35. DEED — General "Warranty." — The general "warranty" clause in a conveyance is equivalent to the several special covenants in use under the common law, and is sufficient to compel the grantor, before receiving the full amount of the purchase money, to discharge all liens on the property.—SMITH v. JONES, Ky., 31 S. W. Rep. 475.

36. DEED AS MORTGAGE.—The fact that defendants conveyed to plaintiffs for a money consideration, and on the same day plaintiffs agreed to lease the land to defendants, is only *prima facie* evidence that there was

a loan of money and giving of security for its repayment.—MEARS V. STROBACH, Wash., 40 Pac. Rep. 621.

37. DEED—Description. — Where a grantor conveys part of a lot by a deed describing it by metes and bonds, and subsequently conveys the balance of the lot to another, describing it as being bounded by the land previously conveyed, the grantee in the first conveyance is limited to the tract described in his deeds by metes and bonds, though less than it was the intention of the parties thereto to convey.—PROBETT V. JENKINSON, Mich., 63 N. W. Rep. 646.

38. EQUITY—Reformation of Instrument. — Plaintiff made a certain payment to defendant bank, and received in exchange a note signed by a firm composed of the officers of the bank, and the business of which was transacted in the bank's office. He subsequently gave a check to his wife, which was also exchanged at the bank office for a similar note. Plaintiff and his wife could both read and write, and had transacted considerable business with banks. Plaintiff retained the notes for two years, and, upon failure of the firm, began suit to reform the notes and change them into certificates of deposits of the bank, on the ground that he intended to deposit his money with the bank: Held, that plaintiff was not entitled to a decree.—MURPHY V. FIRST NAT. BANK OF CEDAR FALLS, Iowa, 63 N. W. Rep. 702.

39. EVIDENCE — Books of Account. — In an action against a wife to recover an account alleged to have been incurred by her absent husband as a family expense, for which the property of either is made liable by Code, § 2214, it appeared that plaintiff kept no books of original entry, but entered sales on slips, and at the close of the day entered them on a ledger, which did not show the kinds of goods sold: Held, that the ledger was not admissible as a book of original entries.—WAY V. CROSS, Iowa, 63 N. W. Rep. 691.

40. EVIDENCE—Declarations of Agent.—The declarations of agents and employees, concerning matters as to which they have no authority to speak for the master, and not made in connection with the performance of any duty, or the transaction of any business for the employer, are mere hearsay, and inadmissible against the principal.—MISSOURI PAC. RY. CO. V. JOHNSON, Kan., 40 Pac. Rep. 641.

41. EXECUTION — Income of Trust Fund.—Where a fund is given to executors, to keep invested and pay over the interest to a legatee during his life, a trust is created, and the income of such fund cannot be reached by a judgment creditor of the legatee in satisfaction of his judgment, by supplementary proceedings under the act respecting executions.—LINN V. DAVIS, N. J., 32 Atl. Rep. 129.

42. EXECUTION — Exemption. — Residence entitling one to the protection of the exemption laws, when once acquired, is not lost by preparations to change one's residence to another State, coupled with an intent to change.—HERZFELD V. BEAZLEY, Ala., 17 South. Rep. 623.

43. FACTORS—Lien for Advances.—No express agreement is necessary to give a factor or commission merchant a lien upon the goods in his hands for advances and expenditures made by him in the business of his agency, or connected with the goods consigned to him. The lien arises from an agreement which the law implies. Hence, although the contract between him and his principal is in writing and contains no express agreement to that effect, he is, nevertheless, entitled to a lien, provided the written contract contains no special agreement inconsistent with the existence of such lien.—HAEBLER V. LUTTGEN, Minn., 63 N. W. Rep. 720.

44. FEDERAL COURTS—Conflict of Jurisdiction.—The fact that a sale was executed under a decree of a Federal court, and the property delivered to the purchaser, in a suit to foreclose a mortgage given by a corporation in trust to stockholders, does not prevent a State court of competent jurisdiction from entertaining a suit by simple contract creditors of the corporation, who were neither parties nor privies to the foreclosure suit, for relief from the fraud of the corporation and stockholders, except that the court cannot interfere with the possession of the property by the trustee or receiver.—BRIERFIELD COAL & IRON CO. V. GAY, Ala., 17 South. Rep. 618.

45. FEDERAL COURTS—Circuit Court— Jurisdiction.—The Circuit Court has jurisdiction in a general creditors' suit properly pending therein, for the collection and distribution of the assets of an insolvent corporation, to hear and determine an ancillary suit instituted in the same cause by its receiver, in accordance with its order, against debtors of such corporation, so far as in said suit the receiver claims the right to recover from any one debtor a sum not exceeding $2,000.—WHITE V. EWING, U. S. S. C., 15 S. C. Rep. 1018.

46. FIXTURES.—It was not necessary to allege that plaintiff was the owner and holder of the notes in suit, where he averred that before maturity he bought them from, and they were indorsed to him by, the payee, and that defendants, as makers and indorsers, were indebted to him for their amount. Machinery placed in a building and fastened by bolts to a brick foundation thereby becomes a part of the realty, and, with the latter, subject to an existing vendor's lien thereon.—SIMPSON, HARTWELL & STOPPLE V. MASTERSON, Tex., 31 S. W. Rep. 419.

47. FRAUDULENT CONVEYANCES—Innocent Purchaser.—T, a stockholder to a large amount in an insolvent bank, on the day of the failure of such bank conveyed a large quantity of real estate, constituting all his property, to his children, in consideration of natural love and affection. The children of T subsequently conveyed portions of such real estate to purchasers for valuable consideration and mortgaged other portions. None of the purchasers or mortgagees had actual notice of T's indebtedness at the time of the conveyances to his children: Held, that the record of the deeds in consideration of love and affection was not enough to put such purchasers or mortgagees upon inquiry, and they were entitled to hold the land, as against the receiver of the bank.—YARDLEY V. TORR, U. S. C. C. (Penn.), 67 Fed. Rep. 857.

48. FRAUDS, STATUTE OF — Agreement Relating to Land.—Where the owner of the lot and the street number appears on the agreement, the omission of the name of the city or town in which the lot is located does not render the description indefinite.—PRICE V. MCKAY, N. J., 32 Atl. Rep. 130.

49. GARNISHMENT — Receiver as Garnishee.—A receiver is not a "public officer," within the meaning of How. Ann. St. § 8096, providing that "no person shall be adjudged a garnishee by reason of any money in his hands as a public officer."—COHNEN V. BLACK, Mich., 63 N. W. Rep. 641.

50. GIFT—Assignment — Consideration.—The allegation in a petition that the note in suit was assigned to plaintiff "for a good and valuable consideration" is sustained by evidence that the consideration was "natural love and affection." — MEYER V. KOEHRING, Mo., 31 S. W. Rep. 449.

51. HUSBAND AND WIFE — Conveyance—Validity.—In an action to set aside a conveyance made by a husband as in fraud of his deceased wife's interest in community property, evidence showing what property the husband and wife respectively had at the time of their marriage, and what property they afterwards acquired, is admissible. Declarations by the husband after his wife's death as to what was community property, and his statements claiming as his other property belonging to his wife or the community, are also admissible to show fraud in connection with the community property in controversy.—SMITHEAL V. SMITH, Tex., 31 S. W. Rep. 422.

52. INSOLVENCY — Preferences.—A transfer of property by an insolvent debtor to one of his creditors to secure an existing debt may constitute an unlawfu

preference, although the debtor was induced to make the transfer for the purpose of obtaining an extension of credit, in the hope of being thereby enabled to continue his business.—PENNY v. HAUGAN, Minn., 63 N. W. Rep. 728.

53. INSURANCE — Fraud.—An insurance policy provided that it should be void in case of any fraud or false swearing by the insured, either before or after the loss, touching any matter relating to the insurance, and that the word "insured," as used in the policy, should be held to include the legal representative of the insured: Held, that the term "legal representative" referred to one who succeeds to the legal rights of the insured by reason of his death, or the transfer of the policy, and not to a mere agent of the insured.—METZGER v. MANCHESTER FIRE ASSUR. CO., Mich., 63 N. W. Rep. 650.

54. INSURANCE — Stipulations.—Where a policy of fire insurance on a stock of goods in a country store contained a printed stipulation that benzine, fireworks, etc., should not be kept without the consent of the insurer, and a written provision covering a stock of goods "such as is usually kept for sale in country stores," proof was admissible, in an action on the policy, to show that the prohibited goods came within the written clause.—TUBB v. LIVERPOOL, Ala., 17 South. Rep. 615.

55. INSURANCE — Proof of Loss — Waiver.—Where an insurance company demands, as part of the proofs of loss, an inventory destroyed in the fire, and which it was not entitled to under the policy, the alternative given the assured being that, if it was not furnished, only a compromise would be entertained, it waives formal proof of loss.—PHOENIX INS. CO. v. CENTER, Tex., 31 S. W. Rep. 446.

56. JUDGMENT — Reformation.—Where a mistake in the amount for which judgment is rendered is clearly the result of miscalculation, the judgment may be set aside and corrected.—EMISON v. WALKER, Ky., 31 S. W. Rep. 461.

57. JUDGMENT — Modification.— A judgment against an administrator may be vacated or modified, at the instance of a general creditor of the estate, on the ground of illegality in proceedings prior to the judgment, or in the judgment itself.—O'KEEFE v. FOSTER, Wy., 40 Pac. Rep. 525.

58. JUDGMENT FOR LICENSE TAX — Collateral Attack. —A complaint showing that plaintiff had passed an ordinance imposing a license tax, and that defendant was liable for the tax and had failed to pay, is sufficient to sustain a judgment for the tax as against collateral attack, even though rendered by a court of limited jurisdiction.—TOWN OF HAYWARDS v. PIMENTEL, Cal., 40 Pac. Rep. 545.

59. JUDGMENT AGAINST COUNTY — Enforcement.— Comp. St. div. 5, § 751, provides that execution shall not issue on a judgment against a board of county commissioners, but that "the same shall be levied and paid by tax or other county charges," "provided, that execution may issue if payment be not made within 60 days after the time required for the payment of county taxes to the county treasurer:" Held, that a judgment recovered against a board of county commissioners after the annual tax levy is not entitled to payment until after the next levy.—STATE v. BOARD OF COM'RS OF CASCADE COUNTY, Mont., 40 Pac. Rep. 595.

60. LANDLORD AND TENANT — Coal Lease.—An agreement whereby a party had the exclusive right to mine coal under certain land for 20 years, unless the coal sooner gave out, and to use in connection with the mine five acres of the surface of the land to erect buildings thereon, and to build and operate railroads and flow water thereover, for a certain royalty per ton of coal mined, not to fall below a fixed amount per year, payable as rent for all the privileges granted, created the relation of landlord and tenant; within Code, § 2017, giving a landlord's lien for "rent."—LACEY v. NEWCOMB, Iowa, 63 N. W. Rep. 704.

61. LANDLORD'S LIEN — Waiver.—Under Code, § 2017, giving a landlord a lien for rent on all crops grown on the premises, the lien exists as against one who buys the crops not knowing they were raised on leased premises.—BLAKE v. CHAS. COUNSELMAN & CO., Iowa, 63 N. W. Rep. 679.

62. LIEN—Personal Judgment.—Where, in an action to enforce a mechanic's lien, a decree is rendered enforcing the lien, and also embracing a personal judgment against defendant, plaintiff may voluntarily relinquish the right to enforce the lien, owing to the invalidity of the decree in that respect, and still enforce the personal judgment.—FINCH v. TURNER, Colo., 40 Pac. Rep. 565.

63. LIMITATION OF ACTION — New Promise by Executrix.—An independent executrix has power, before a claim against deceased is barred, to suspend the running of limitations by her promise to pay the claim.—DANIEL v. HARVIN, Tex., 31 S. W. Rep. 421.

64. LIMITATION OF ACTIONS—Continuing Nuisance.— Defendant constructed a ditch through plaintiff's land over which it had secured a right of way, and, several years thereafter, by the gradual percolation of water from such ditch, owing to the character of the soil, damages resulted to plaintiff's land: Held, that the nuisance was a continuing one, and damages could be recovered for injuries occurring within six years before suit. — CONSOLIDATED HOME SUPPLY DITCH & RESERVOIR CO. v. HAMLIN, Colo., 40 Pac. Rep. 583.

65. MALICIOUS PROSECUTION — Probable Cause.— In an action for malicious prosecution, it is for the court to determine whether certain admitted or clearly proven facts constituted probable cause.— SMITH v. LIVERPOOL & LONDON & GLOBE INS. CO., Cal., 40 Pac. Rep. 540.

66. MANDAMUS TO GOVERNOR.—The governor of this State, acting as governor, is not an officer inferior to this court, and cannot be compelled by *mandamus* to perform a duty not strictly ministerial. *Mandamus* will not lie to compel the governor to revoke an order suspending a member of the board of trustees of charitable institutions, based on charges preferred which the governor deems worthy of credit.—HOUSEHOLDER v. MORRILL, Kan., 40 Pac. Rep. 664.

67. MANDAMUS.—The warden of the penitentiary cannot, by *mandamus*, compel the board of directors of that institution to examine the adjusted bills and accounts of the warden incurred in carrying on the business of the penitentiary and indorse the warden's report or statement of the same, the duty of the board in the premises being to the public rather than to the warden.— CHASE v. BOARD OF DIRECTORS OF STATE PENITENTIARY, Kan., 40 Pac. Rep. 665.

68. MARRIAGE—Evidence.—The fact that slaves after their emancipation continued to live together as husband and wife until the death of the wife (a period of 30 years) shows a valid marriage.—COLEMAN v. VOLLMER, Tex., 31 S. W. Rep. 413.

69. MASTER AND SERVANT—Negligence.—It is the duty of a railroad company to not only furnish reasonably safe machinery and appliances for the operation of its road, but to use reasonable care and diligence to maintain them in such condition.—ATCHISON, T. & S. F. R. CO. v. NAPOLE, Kan., 40 Pac. Rep. 669.

70. MECHANIC'S LIEN—Contract.—Where a contract was contained in an offer in writing and in an acceptance by telegram, one claiming a mechanic's lien under it, who had possession of the telegram only, while the owner of the building had the offer, did not "have" a written contract, within the meaning of Rev. Civ. St. art. 3165, providing that, if the lien claimant "have" no written contract, it will be sufficient to file an itemized account of the claim. — WARNER ELEVATOR MANUF'G CO. v. MAVERICK, Tex., 31 S. W. Rep. 353.

71. MINING CLAIM—Notice of Location.—Under Gen. Laws, div. 5, § 1477, requiring a person making a location of a mining claim to file a declaratory statement thereof on oath, a statement which, on its face, sp-

pears to have been verified a year before the location of the mine, is insufficient in the absence of proof that the affidavit was wrongly dated by mistake.—BERG V. KOEGEL, Mont., 40 Pac. Rep. 605.

72. MORTGAGES—Sale under Power.—Where a mortgagee sells the land under a power in the mortgage, and himself becomes the purchaser, a subsequent sale by him, though it purports to be made under the same power, is of no more force than any other private sale. —LOVELACE V. HUTCHINSON, Ala., 17 South. Rep. 628.

73. MUNICIPAL CORPORATION—Police Officer.—Under a city charter providing that police officers when employed in the service of process shall receive the same fees as constables, a policeman who arrests persons charged with offenses against the State, under warrants issued by a justice of the peace, is entitled to compensation therefor from the county, though a city ordinance fixes the pay of police officers, and he has received his full pay from the city.—WHITE V. BOARD OF SUP'RS OF MANISTEE COUNTY, Mich., 63 N. W. Rep. 653.

74. MUNICIPAL CORPORATION— Constitutional Law.—A subscription made by the city of Geneseo to the capital stock of a corporation organized for the purposes of prospecting for, developing, and operating natural gas, coal, oil, salt and other minerals, is invalid, and although bonds are issued, and accepted in payment for such capital stock, does not render the city a stockholder in the corporation. — CITY OF GENESEO V. GENESEO NATURAL GAS, COAL, OIL, SALT & MINERAL CO., Kan., 40 Pac. Rep. 655.

75. NEGOTIABLE INSTRUMENT—Note to Trustee.—One to whom a note is made as trustee for another may sue on the note in his own name, though Code, § 2594, provides that such suits must be brought by the real party in interest.—RICE V. RICE, Ala., 17 South. Rep. 628.

76. NEGOTIABLE INSTRUMENT—Action on Note.—In a suit against the maker of a promissory note, payable at a particular time and place, it is not necessary to allege in the declaration a presentation for payment at the time and place named, nor to prove such presentation at the trial, in order to entitle the plaintiff to recover on such note. The maker of such note is still liable to pay, though the note be not presented at the time and place designated, and it devolves upon him to show as matter of defense a readiness at the time and place to meet the note, and such defense must be set up by plea, and can only be in bar of damages and costs of suits.—GREELEY V. WHITEHEAD, Fla., 17 South. Rep. 643.

77. OFFICE AND OFFICER— County Treasurer—Eligibility.—A person who, by appointment, served two months as county treasurer, and then one term by election, is not ineligible for the following term under the constitutional provisions that no county officer shall be eligible to hold his office more than two successive terms.—KOONTZ V. KURTZMAN, Wash., 40 Pac. Rep. 622.

78. PARTNERSHIP—What Constitutes.—The proceeds of a sale of corporate stock owned by plaintiff, having been paid to defendants, in whose names the shares stood, were, with plaintiff's consent, put into a partnership formed by defendants and third persons, the latter having no knowledge of plaintiff's interest therein: Held, that plaintiff was a partner of defendants as to their interest in the firm.—HENRY V. EVANS, Iowa, 63 N. W. Rep. 687.

79. PARTNERSHIP—Insolvency—Action by Receiver.—A receiver of the insolvent estate of one member of a copartnership cannot maintain an action to set aside as preferential a conveyance of real and personal property belonging to a copartnership and of its assets, given to secure a firm debt.—MASTERMAN V. LUMBERMAN'S NAT. BANK OF STILLWATER, Minn., 63 N. W. Rep. 723.

80. PARTNERSHIP—Rights of Creditors.— While it is the well-established rule in equity that, where one creditor holds security upon two funds, with liberty to resort to either for the payment of his demand, and another creditor holds a junior security upon one only of the funds, the former will be compelled to exhaust the fund which he alone can reach before resorting to the other fund, and thereby depriving the latter creditor of his security, yet the rule is one of equity, and cannot be invoked by the creditor against another in cases where it would injuriously affect the rights of the prior creditor or third person.—STATE BANK OF FLORIDA V. ROCHE, Fla., 17 South. Rep. 652.

81. PARTNERSHIP—Contract by one Partner. — The general rule is that one partner has no implied authority to bind the firm by an instrument under seal, but where such an instrument has been executed by one partner in the firm name, in the scope of the partnership business, it may be ratified by the other partners by prior or subsequent oral assent, or by implication from acts or declarations of such partners.—TISCHLER V. KURTZ, Fla., 17 South. Rep. 661.

82. PARTNERSHIP — Advancements by Partners.—Where the amount of advances made by a partner to the firm is paid him out of firm funds, the debt is satisfied; the contention that, because he was entitled to one-half of the firm funds, he only received from the firm one-half of the debt, being untenable.—THOMPSON V. BECK, Nev., 40 Pac. Rep. 516.

83. PARTNERSHIP—Authority of Partner.—A partnership formed to carry on the business of general contractors and builders being a non-trading partnership, a person who accepts from one of the partners a firm note, signed by him, and secured on the firm's chattels, is charged with notice that under the partnership agreement the partner had no authority to execute the note or mortgage on behalf of the firm.—SNIVELY V. MATHESON, Wash., 40 Pac. Rep. 628.

84. PLEADING — Counterclaim.—A landlord, in an action for rent, sued out an attachment, and, upon its being quashed, filed an amended petition in equity for the foreclosure of the lien under the lease, as a mortgage: Held, that the filing of the amended petition was not the beginning of a new action, hence damages caused to defendant by the attachment could not be pleaded as a counterclaim, as they were not an existing cause of action at the time of the commencement of the suit, as required by Code, § 2659.—YOUNGERMAN V. LONG, Iowa, 63 N. W. Rep. 674.

85. PROCESS—Abuse—Levy on Exempt Property.—An action will lie against one who maliciously, and without probable cause, garnishes the exempt earnings of his debtor, knowing them to be exempt, with the purpose of harassing the latter's employers, and thereby compel him to pay the debt out of such exempt money in order to avoid discharge.—NIX V. GOODHILE, Iowa, 63 N. W. Rep. 701.

86. PUBLIC LANDS—Grants—Riparian Rights.—Where the government grants lands on the bank of a fresh-water stream, without reservation, in States where the common law prevails, all unsurveyed islands between the middle line of the stream and the bank pass by the grant, and the riparian owner cannot be divested by a subsequent survey and grant of the islands.—GRAND RAPIDS & I. R. CO. V. BUTLER, U. S. S. C., 15 S. C. Rep. 991.

87. QUIETING TITLE—Title to Support.—He who comes into equity to get rid of a legal title as a cloud upon his own must show clearly the validity of his own title and the invalidity of his opponent's. Equity will not act in such cases in the event of a doubtful title; and a party, to be relieved and to succeed in contests of this character, must do so on the strength of his own title, and not on the weakness of his adversary's.—LEVY V. LADD, Fla., 17 South. Rep. 635.

88. RAILROAD COMPANY—Injury—Contributory Negligence.—Absence of contributory negligence must be proved by plaintiff, and any presumption of its absence arising from the assumption that one's instincts of self-preservation will make him diligent is over-

come by evidence that a railroad employee, off duty, while walking along a track on his way home, was struck by a train which he had reason to expect, and which he could have heard when 400 feet away.—BAKER v. CHICAGO, R. I. & P. RY. CO., Iowa, 63 N. W. Rep. 667.

89. RAILROAD COMPANY—Negligence.—Where the engineer of a train saw children ahead, in a dangerous position, on a railway bridge having two tracks, knew that another train was close at behind on the other track, and that the place to stand on the bridge between the two tracks was less than three feet, having a plank walk one foot wide,—the jury is justified in finding him negligent for not stopping his train, when he could have done so, although he thought the children would go on the plank walk.—SUTZIN v. CHICAGO, M. & ST. P. RY. CO., Iowa, 63 N. W. Rep. 710.

90. RAILROAD COMPANIES — Trespasser.—By paying money to a brakeman on a freight train, a trespasser does not become a passenger, nor does he obtain any of a passenger's rights; for it is not within the scope or authority, apparent or real, of a brakeman to collect fare.—MCNAMARA v. GREAT NORTHERN RY. CO., Minn., 63 N. W. Rep. 726.

91. RAILROAD COMPANY — Right of Way.—In a suit to enjoin interference with plaintiff railroad company's right of way, defendant cannot attack the capacity of plaintiff's corporate grantor to acquire a right of way and operate a railroad thereon.—KANSAS CITY & S. E. RY. CO. v. KANSAS CITY & S. W. RY. CO., Mo., 31 S. W. Rep. 451.

92. RAILROAD COMPANIES — Parallel Lines — Injunction.—A State may maintain a suit to enjoin a railroad company from purchasing the properties and lines of other companies in violation of Const. § 201, providing that no railroad company shall acquire, by purchase or otherwise, any parallel or competing line.—LOUISVILLE & N. R. CO. v. COMMONWEALTH, Ky., 31 S. W. Rep. 476.

93. RECEIVER — Property in Custodia Legis—Attachment.—Property which has been seized by attachment issuing out of the Circuit Court, and delivered to a claimant on the execution of a statutory bond, is in the custody of the law, and cannot, except in assertion of a paramount lien, be transferred by a court of equity to a receiver at the instance of another creditor of the attachment defendant.—WILLIAMS v. DISMUKES, Ala., 17 South. Rep. 620.

94. REMOVAL OF CAUSES.—The mere fact that the defendant is a United States marshal justifying under a writ of attachment issued from the Federal Court for this district, does not confer upon him any right of removal of the cause to that court.—WALKER v. COLEMAN, Kan., 40 Pac. Rep. 640.

95. SPECIFIC PERFORMANCE.—As a general rule, an action for the specific enforcement of a contract relating to chattels will not lie, because the law affords adequate and complete redress in an action for damages.—NORTHERN TRUST CO. v. MARKELL, Minn., 63 N. W. Rep. 785.

96. SPECIFIC PERFORMANCE — Statute of Frauds.—Where the owner of land contracts to convey the same to another, who is in possession thereof conjointly with him, the payment of the price and subsequent surrender of exclusive possession to the vendee, who makes valuable and permanent improvements on the property, are sufficient to take the contract out of the statute of frauds.—PECK v. STANFIELD, Wash., 40 Pac. Rep. 635.

97. STATUTES—Special Act—City Charter.—Const. art. 3, § 56, prohibiting the legislature from passing a local or special law regulating the practice or changing the rules of evidence in a judicial proceeding, does not apply to acts granting special charters to cities containing over 10,000 inhabitants; such charters being specially authorized by article 11, § 5.—TEXAS SAVINGS & REAL-ESTATE INV. ASS'N v. PIERRE'S HEIRS, Tex., 31 S. W. Rep. 426.

98. TAXATION—Excessive Assessment.—The fact that property has been assessed at an excessive valuation does not render the assessment absolutely void, and, on application for judgment for delinqent taxes, the court may reduce the same, and give judgment for an amount found to be just.—PACIFIC COUNTY v. ELLIS, Wash., 40 Pac. Rep. 682.

99. TENDER—Payment into Court.—To abate interest from the time of a tender of the principal and interest due, the tender must be kept good by bringing the money into court as offered.—DEACON v. CENTRAL IOWA INV. CO., Iowa, 63 N. W. Rep. 673.

100. TRADE-MARK — Unfair Competition — Fraud of Plaintiff.—Fraud, such as to disentitle a plaintiff to relief against unfair competition in his business, cannot be predicated of statements which, owing to the brevity required by the limited space of a label, are not minutely accurate; nor of the use on two classes of goods of labels which might be mistaken for each other, the statements on both being true; nor of the use, to a limited extent, of the name of a firm to which the plaintiff believed itself to have succeeded; nor of the use of "trade talk" in advertisements.—CLARK THREAD CO. v. ADMITAGE, U. S. C. C. (N. Y.), 67 Fed. Rep. 896.

101. TRUST AND TRUSTEE—Validity.—The fact that the person to whom a chattel mortgage in trust for creditors was given was insolvent will not invalidate it. Where the subject of a chattel mortgage in trust for creditors was electrical goods, the fact that the mortgagee was unskilled in the use and handling of such goods will not invalidate the trust.—LEWIS v. ALEXANDER, Tex., 31 S. W. Rep. 414.

102. VENDOR'S LIEN.—A conveyance of an interest in land to one who owned the remaining interest, made for the purpose of effecting a sale of the whole tract to another, the deed reciting that the consideration had been paid, is inconsistent with the reservation of a vendor's lien on the land.—SCHEERER v. AGEE, Ala., 17 South. Rep. 610.

103. WAREHOUSEMAN— Parties.—A bailor, who has pledged her warehouse receipts for cotton in store, cannot, either in her own name, or for the use of the pledgee, bring replevin for the cotton.—SELLECK v. MACON COMPRESS & WAREHOUSE CO., Miss., 17 South. Rep. 603.

104. WATERS — Navigable Streams — Water Rights.—Const. art. 14, § 1, which makes the use of water for sale, rental, or distribution a public use, does not abridge the rights of an upper riparian owner on the stream from which a city water company distributes water.—PEOPLE v. ELK RIVER MILL & LUMBER CO., Cal., 40 Pac. Rep. 531.

105. WILLS — Nature of Estate Devised.—A will devising an estate to a wife "during her life, with full power to sell, transfer and dispose of same as much as may from time to time be needed for her support and the cancellation of any indebtedness now and hereafter existing," with the remainder at her death to the son, vests a life estate in the wife, with the power of disposal for the specified purposes, and a remainder in the son.—IN RE PROCTOR'S ESTATE, Iowa, 63 N. W. Rep. 670.

106. WILL—Investment—Payment of Income.—Where testator directed his executors to invest a certain sum, and pay the income thereof to a designated person during her life, an order of court requiring the payment to such person of any sum of money directly from the funds of the estate is erroneous.—MACKAY v. MACKAY, Cal., 40 Pac. Rep. 358.

107. WITNESS—Husband and Wife.—It is error, on the trial of a husband for slander of his wife, to permit the latter to testify against him, as Code Cr. Proc. art. 735, allowing either to do so in a "criminal prosecution by one against the other," applies only to cases of personal violence.—BAXTER v. STATE, Tex., 31 S. W. Rep. 394.